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GERD W. KRÄMER
RATHAUSSTR.1
LEIMEN, 69181
GERMANY

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**OFFICE OF PETITIONS**

In re Application of
Gerd W. KRÄMER
Application No. 09/704,803
Filed: November 2, 2000
Title of Invention:
AUTOMATIC PROGRAMMING

ON PETITION

This is a decision on the renewed petition under 37 CFR 1.137(a)[1], filed November 30, 2004 and supplemented February 8, 2005, to revive the above identified application.

The renewed petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(b)".This is **not** a final agency decision.

This application became abandoned January 28, 2004 for failure to timely pay the issue fee on or before January 27, 2004. A petition to revive was filed October 21, 2004 and the fee for the petition was received October 27, 2004. The petition was dismissed in a decision mailed November 17, 2004 because the petition lacked the proper issue fee.

The decision incorrectly indicated that both the issue fee and petition fee under 37 CFR 1.137(a) were lacking. On the date of the decision, November 17, 2004, the issue fee for

[1] A grantable petition under 37 CFR 1.137(a) must be accompanied by:

(1) the required reply, unless previously filed; In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional utility or plant application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

(2) the petition fee as set forth in 37 CFR 1.17(l);

(3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable; and

(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(c)).

a small entity was set at $685 and the unavoidable petition fee for a small entity was set at $55, as petitioner has so ably stated. The decision was incorrect as it related to the amounts due and we offer our most humble apologies for the typographical error. However, the decision was correct in stating that the funds received were deficient.

Petitioner argues that he directed his bank to make the payment of $720.00, however, by wire transfer on October 27, 2004, the finance account for the above identified patent application was credited with $714.00, a copy of the check is attached for your review. Apprarantly, petitioner's bank must have charged a fee for making the transfer. Of the amount received, $55.00 has been applied to the petition fee and the remaining $659.00 has been applied as a partial payment for the issue fee.

For the record, as of October 1, 2004, the issue fee was set at $685.00. The fee due is determined by the fees in effect at the time of submisison of the payment. We are sorry for any misinformation you received from the USPTO but a delay in properly rendering fees due resulting from the lack of knowledge or improper application of the patent statute, rules of practice or the MPEP does not constitute an "unavoidable"delay.[2] A delay caused by an applicant's lack of knowledge or improper application of the patent statute, rules of practice or the MPEP is not rendered "unavoidable" due to: (1) the applicant's reliance upon oral advice from Office employees; or (2) the Office's failure to advise the applicant of any deficiency in sufficient time to permit the applicant to take corrective action.[3] Be reminded that a requirement for proceeding under the unavoidable standard is that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable. That does not mean that the time period ends at January 27, 2004 when the issue fee was due.

The issue fee is a statutory requirement and cannot be waived or the time period for payment of such cannot be extended. Thus, in view of the above and pursuant to 37 CFR 1.137(a), the instant petition still lacks items (1). The application will remain in an abandoned status until such time as the balance of the issue fee ($26.00) has been paid. Also, a review of the record does not reveal that the $130.00 paid for a filing date petition back in February 2001 is of record.

Finally, while we are not in a position to discuss the merits of the petition under the unavoidable standard until the petition fee is paid in full, we will advise that the petition filed October 21, 2004 references a "rescript from the social welfare office" to prove petitioners

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[2] See Haines v. Quigg, 673 F. Supp. 314, 317, 5 USPQ2d 1130, 1132 (N.D. Ind. 1987), Vincent v. Mossinghoff, 230 USPQ 621, 624 (D.D.C. 1985); Smith v. Diamond, 209 USPQ 1091 (D.D.C. 1981); Potter v. Dann, 201 USPQ 574 (D.D.C. 1978); Ex parte Murray, 1891 Dec. Comm'r Pat. 130, 131 (1891).

[3] See In re Sivertz, 227 USPQ 255, 256 (Comm'r Pat. 1985); see also In re Colombo, Inc., 33 USPQ2d 1530, 1532 (Comm'r Pat. 1994)(while the Office attempts to notify applicants of deficiencies in their responses in a manner permitting a timely correction, the Office has no obligation to notify parties of deficiencies in their responses in a manner permitting a timely correction).

ability or inability to pay the issue fee when due. The requirement for proof of financial hardship is a complete showing of petitioner's, or the party responsible for payment of the maintenance fee's, financial condition including all income, expense, assets, credit, and obligations which made the delay unavoidable. Petitioner must provide verified copies of any available documents or records. The document attached to the petition is in a language other than English and thus cannot serve as proof of anything unless it is translated. Even then we cannot state for certain that it will be conclusive evidence of petitioner's financial situation or for the matter for which it is being presented, only that since it was presented it should at least be in English so that it can be considered.

Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

> The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present.[4]

Specifically, an application is "unavoidably" abandoned only where petitioner, or counsel for petitioner, takes all action necessary for a proper response to the outstanding Office action, but through the intervention of unforeseen circumstances, such as failure or mail, telegraph, telefacsimile, or the negligence of otherwise reliable employees, the response is not timely received in the Office.[5]

If petitioner does not think that he can prevail under the unintentional standard of review, petitioner may wish to consider filing a petition under 37 CFR 1.137(b),[6] which now

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[4] In re Mattullath, 38 App. D.C. 497, 514-15 (1912)(quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 USPQ 666, 167-68 (D.D.C. 1963), aff'd, 143 USPQ 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913). In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." Smith v. Mossinghoff, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982). Finally, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was "unavoidable." Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

[5] Ex parte Pratt, 1887 Dec. Comm'r Pat. 31 (Comm'r Pat. 1887).

[6] Effective December 1, 1997, the provisions of 37 CFR 1.137(b) now provide that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b). A grantable petition filed under the provisions of 37 CFR 1.137(b) must be accompanied by:

provides that where the delay in reply was unintentional, a petition may be filed to revive an abandoned application or a lapsed patent pursuant to 37 CFR 1.137(b).

The filing of a petition under the unintentional standard cannot be intentionally delayed and therefore should be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b). As of the date of this decision, the petition fee for a petition under 37 CFR 1.137(b) is set at $750.00. The fees already paid cannot be applied to that fee since petitioner has already received consideration for the petition under 37 CFR 1.137(a).

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petitions
Commissioner for Patents
P.O. Box 1450
Alexandria VA 22313-1450

By FAX: (703)872-9306

Telephone inquiries concerning this matter may be directed to the undersigned Petitions Attorney at (571) 272-3212.

Patricia Faison-Ball

Patricia Faison-Ball
Senior Petitions Attorney
Office of Petitions

Attachment: 1) Copy of Check received October 27, 2004
2) "Rescript" in language other than English, received October 21, 2004

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(1) the required reply, unless previously filed. In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In a nonprovisional application filed on or after June 8, 1995, and abandoned for failure to prosecute, the required reply may also be met by the filing of a request for continued examination in compliance with § 1.114. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof. In an application abandoned for failure to pay the publication fee, the required reply must include payment of the publication fee.

(2) the petition fee as set forth in 37 CFR 1.17(m);

(3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional. The Commissioner may required additional information where there is a question whether the delay was unintentional; and

(4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137©)).